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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID RAMIREZ MELGOZA,

Defendant and Appellant.

H032508

(Santa Cruz County

Super. Ct. No. WF00029)

I. STATEMENT OF THE CASE

A jury convicted David Ramirez Melgoza of selling a firearm not through a licensed dealer and unlawful possession of a firearm by a felon and further found that he committed the offenses for the benefit of a criminal street gang. (Pen. Code, §§ 12072, subd. (a)(5), 12021, subd. (a)(1), 186.22, subds. (b)(1) & (d).)¹ Thereafter the court found that defendant had served two prior prison terms. At sentencing, the court denied probation and imposed a two-year term for the sale offense with a consecutive three-year gang enhancement and two consecutive one-year prison-term enhancements and a concurrent two-year term for unlawful possession with a two-year gang enhancement.

¹ All further unspecified statutory references are to the Penal Code.

On appeal from the judgment, defendant claims the prosecutor was guilty of misconduct during closing argument. He also claims the court erred in imposing separate punishment for both offenses.

We stay the term imposed for unlawful possession and affirm the judgment as modified.

II. FACTS

Ishmael Farias met defendant when both were incarcerated in a jail unit reserved for Norteño gang members. After his release, Farias decided to quit his gang and became a police informant. Continuing to pose as a Norteño gang member, he participated in numerous undercover buys of contraband for the police.

On July 31, 2007, around 6:00 p.m., defendant called Farias and said he had a rifle for sale. Later that evening, Farias went to defendant's house wearing a recording device and carrying marked money. There, he bought the rifle, which was disassembled and in a box. Defendant erroneously told Farias that a heat shield on the rifle was really a silencer. He indicated that the rifle did not work because it needed a "clip." However, he said that he had ordered one and would have it in a few days. Farias completed the sale, left with the rifle, and delivered it to the police.

III. PROSECUTORIAL MISCONDUCT

Defendant claims the prosecutor was guilty of incurably prejudicial misconduct when, during closing argument, he implied that the rifle was operable.

Background

Defendant was indicted by a grand jury. At the grand jury proceedings, Officer Thomas Lee Cunningham, Jr., of the Federal Justice Department's Bureau of Alcohol, Tobacco, and Firearms testified that the weapon sold by defendant was a survival rifle, which meant that it could be easily disassembled and put into a backpack. He said that at the time it was sold, the rifle was inoperable because the barrel had been cut and a bullet would not enter the chamber. He further explained, however, that he could cycle the

“action,” pull the trigger, and hear the hammer fall. He said that one could easily fix the rifle by buying an item that was not regulated by the state or federal government. He further observed that the rifle had a heat shield, which, he explained, would help cool the barrel after multiple rounds are fired.

Prior to trial, the court granted the prosecutor’s motion to exclude evidence that the rifle was presently inoperable. The court concluded that such evidence was irrelevant because even a fully disassembled rifle constitutes an operable firearm for purposes of the Dangerous Weapons Control Law (§ 12000 et seq.). (See *In re Bartholomew D.* (2005) 131 Cal.App.4th 317, 325; *In re Arturo H.* (1996) 42 Cal.App.4th 1694, 1697-1698; *People v. Hamilton* (1998) 61 Cal.App.4th 149, 153; *People v. Marroquin* (1989) 210 Cal.App.3d 77, 80-81; *People v. Hale* (1974) 43 Cal.App.3d 353, 356.) The court rejected defendant’s argument that operability was relevant concerning the gang allegations to show whether the rifle had any value and thus whether defendant sold it to benefit a criminal street gang.

A few times during trial, defense counsel renewed his argument that operability was relevant, and each time the court rejected it. In one instance, Officer Cunningham was testifying about the rifle and its heat shield. He explained that the heat shield dissipates heat and prevents the shooter from burning a hand during multiple firings. He said the shield would be beneficial after five shots were fired. Defense counsel argued that he should have been able to rebut any impression that the rifle could actually fire multiple rounds and argue that the inoperable gun would be of no value or benefit to a gang. However, the court rejected the argument, noting that even an inoperable gun can create fear in the mind of anyone who sees it.

Later, during his opening argument, the prosecutor asserted that defendant did not acquire the rifle to sell through a licensed dealer. He argued that the nature of a survival rifle and defendant’s erroneous statement that it had a silencer indicated that defendant

acquired it to sell for the benefit of a gang because it could be quickly disassembled and concealed after committing crimes.

In response, defense counsel argued that defendant was not a member of any gang, and there was simply no evidence that he sold the rifle to Farias with the intent to benefit a gang. Rather, he sold it simply “to get as much money as he can.”

In his closing argument, the prosecutor reiterated that the nature of the rifle indicated that defendant intended to sell it for gang use. In particular, the prosecutor argued, “Well, members, you heard the evidence of what gang members use guns for. And this is a rather interesting weapon. You heard testimony it’s a survival rifle. It’s designed to be broken down really, really small. And somebody has added a heat shield. [¶] Why? [¶] *So you can fire lots and lots of rounds really, really fast without burning your hands.*” (Italics added.)

Defense counsel immediately objected, and the prosecutor responded, “That was the testimony of Agent Cunningham.” The court overruled the objection. The prosecutor then continued, “This was not a hunting weapon. This is not something you take to the lodge. This is something from which you can infer an illicit purpose.”

Discussion

Defendant claims that the italicized comment by the prosecutor constituted misconduct. Although the prosecutor’s statement accurately reflected Officer Cunningham’s testimony, he argues that it was “clearly misleading,” implied that the rifle was operable, and invited jurors to infer that he intended to benefit a street gang “because he sold to a gang member a rifle that could fire . . . lots [and lots] of bullets without burning the shooter’s hand.”² Moreover, defendant argues that the prosecutor knew the implication was false and violated the very evidentiary ruling the prosecutor had obtained concerning operability.

² Defendant does not claim that the trial court’s ruling on the evidence of operability was erroneous.

Initially, the Attorney General claims that defendant forfeited this claim because he failed to state any ground for his objection and seek an admonition. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336 [failure to object and request admonition forfeits appellate claims of prosecutorial misconduct]; *People v. Thornton* (2007) 41 Cal.4th 391, 454 [same].)

Defendant counters that because the court overruled the objection so quickly, counsel did not have time to request an admonition; moreover, requesting one would have been futile after the ruling. (See *People v. Hill* (1998) 17 Cal.4th 800, 820-821 [request for admonition unnecessary where court immediately overrules objection].) Defendant further argues that in light of counsel's repeated opposition to the exclusion of evidence of operability and argument that without such evidence the jury might erroneously think that the rifle was operable, the basis of his objection to the prosecutor's statement—i.e., that it was misleading—was reasonably apparent. Finally, defendant argues that if trial counsel forfeited the appellate claim by failing to specify the grounds for his objection, this court should address the merits anyway to forestall a claim that counsel's omission constituted ineffective assistance. (See, e.g., *People v. Norman* (2003) 109 Cal.App.4th 221, 229-230 [reaching merits despite failure to object].)

We agree with all of defendant's points and therefore address the merits of his claim.

Although prosecutors are allowed wide latitude in trying cases, they are nevertheless held to an elevated standard of conduct because of their unique function in representing the interests of the state and exercising its sovereign power. (*People v. Hill, supra*, 17 Cal.4th at pp. 819-820.) Under federal constitutional standards, a prosecutor is guilty of misconduct if his or her behavior is so egregious as to render the trial fundamentally unfair and a violation of due process. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Under state law standards, a prosecutor commits misconduct by engaging in deceptive or reprehensible methods of persuasion. (*Ibid.*) Where a

prosecutor has engaged in misconduct, the reviewing court considers the record as a whole to determine if the alleged harm resulted in a miscarriage of justice. (*People v. Duncan* (1991) 53 Cal.3d 955, 976-977.) In considering prejudice “when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]” (*People v. Samayoa, supra*, 15 Cal.4th at p. 841.)

Here, the prosecutor did not expressly state that the rifle was operable. Moreover, the prosecutor’s statement closely tracked the testimony of Officer Cunningham that the weapon is a survival rifle, it can be easily disassembled, and it has a heat shield, whose purpose is to dissipate heat when multiple shots are fired and thereby protect the hand holding the rifle from getting burned. Indeed, the prosecutor referred to Officer Cunningham’s testimony. Finally, the prosecutor did not argue that because the rifle was operable, jurors could infer that defendant sold it to benefit a street gang. Under the circumstances, we find no misconduct.

Defendant’s reliance on *People v. Varona* (1983) 143 Cal.App.3d 566, *People v. Frohner* (1976) 65 Cal.App.3d 94, and *People v. Daggett* (1990) 225 Cal.App.3d 751 does not convince us otherwise.

In *Varona*, the prosecutor argued to the jury that the defendant had no proof that the rape victim was a prostitute even though the court had excluded such proof and the prosecutor knew the victim was on probation for prostitution. (*People v. Varona, supra*, 143 Cal.app.3d at pp. 568-570.) In *Frohner*, the prosecutor faulted the defendant for not calling the police informant as a witness even though the prosecutor knew that the informant was missing because of his own failure to make a good faith effort to locate him. (*People v. Frohner, supra*, 65 Cal.App.3d at pp. 108-109.) In *Daggett*, the prosecutor argued that the molest victim must have learned certain sexual behavior from having been molested by the defendant even though the prosecutor knew that the victim

had been molested by other people and had himself been accused of molesting other persons. (*People v. Daggett*, *supra*, 225 Cal.App.3d at pp. 755-757.)

The prosecutors' arguments and statements in those cases were unambiguous; they exploited evidentiary rulings or circumstances that defendant neither caused nor could control; and they were obviously intended to have jurors draw incriminating inferences that were otherwise unwarranted. Here, the prosecutor's single brief statement was supported by the testimony, and the prosecutor did not invite jurors to draw an impermissible inference from it concerning operability. Moreover, the potential for prejudice from the prosecutor's single comment was not comparable to the clear misconduct in *Varona*, *Frohner*, and *Daggett*.

Furthermore, even if the prosecutor's statement theoretically allowed jurors on their own to infer that the rifle was currently operable, any such inference was harmless.

As noted, the prosecutor's statement was very brief, and it was at most ambiguous. (See *People v. Boyette* (2002) 29 Cal.4th 381, 434-435 [no prejudice where comment was brief, fleeting, and ambiguous].) Moreover, it related to an issue—operability—that was not relevant to the determination of any material issue.

In connection with the charges, the court defined the term "firearm," and, among other things, advised the jury that "[a] firearm does not need to be in working order if it was designed to shoot and appears capable of the shooting. A firearm does not need to be operable." In our view, this instruction reasonably indicated to the jury that the issue of operability was irrelevant concerning both the substantive charges and the gang enhancements. In other words, even if jurors drew an inference that the rifle actually worked, that inference did not make it any more likely that the jury would have found the charges or enhancements true because the instructions focused the jury on whether the firearm appeared to be capable of shooting regardless of whether it was. In this regard, we note that there was no evidence that the rifle was currently operable or that it was operable when defendant sold it. On the contrary, the jury heard the tape recording of the

sales transaction between defendant and Farias, during which Farias asked if the rifle worked, and defendant candidly conceded that it did not have a “clip,” implying that it was not operable unless fixed.

Moreover, the court instructed jurors that they must base their verdict and findings only on the evidence. And the court advised jurors that nothing the attorneys say in the opening statements or closing arguments is evidence. The only *evidence* that jurors heard was defendant’s statement to Farias which implied that the rifle did not work.

Under the circumstances, we do not find a reasonable likelihood that jurors inferred that the gun was operable from the prosecutor’s brief and at most ambiguous statement about Officer Cunningham’s testimony; nor do we find that the alleged misconduct was so egregious as to render the trial fundamentally unfair and a violation of due process (*People v. Samayoa, supra*, 15 Cal.4th at p. 841) or even that it was reasonably probable defendant would have obtained a more favorable result had it not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

IV. MULTIPLE PUNISHMENT

Defendant contends that the court erred in imposing separate terms for acquiring a firearm for an unlawful sale and unlawful possession of a firearm because multiple punishment violated section 654. We agree.

“Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct.” (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) The purpose of the statute is “to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense—the one carrying the highest punishment.” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1134.) The protection of the statute also extends to cases in which a defendant engages in an indivisible course of conduct comprising different acts

punishable under separate statutes. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Thus, “ ‘[i]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.’ ” (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297.) Conversely, multiple punishment is permissible notwithstanding section 654 if the defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other. (*People v. Braz* (1997) 57 Cal.App.4th 1, 10.)

“A defendant’s criminal objective is ‘determined from all the circumstances and is primarily a question of fact for the trial court, whose findings will be upheld on appeal if there is any substantial evidence to support it.’ [Citation.]” (*People v. Braz, supra*, 57 Cal.App.4th at p. 10.) We view the evidence in a light most favorable to the court’s factual determination and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698.)

Here, the probation report opined that section 654 applied because the two offenses “were committed with the same intent.” However, the court found that the offenses reflected acts and intents that were separate and apart from each other.

Section 12072 proscribes the *acquisition* of a firearm with the intent to sell, transfer, or loan it to another person outside of the regulatory scheme for such transactions.³ As defendant correctly points out, in convicting him of that offense, the jury necessarily found, in essence, that he possessed the rifle with the intent to sell it

³ Section 12072, subdivision (a) provides, in relevant part, (5) No person, corporation, or dealer shall acquire a firearm for the purpose of selling, transferring, or loaning the firearm, if the person, corporation, or dealer has either of the following: [¶] (A) In the case of a dealer, intent to violate subdivision (b) or (c). [¶] (B) In any other case, intent to avoid either of the following: [¶] (i) The provisions of subdivision (d). [¶] (ii) The requirements of any exemption to the provisions of subdivision (d).”

outside the regulatory scheme. Indeed, the record reveals that defendant called Farias and said he had a gun to sell him. Moreover, there was no evidence concerning the circumstances under which defendant gained possession of the gun for the purpose of selling it and no evidence concerning when he gained possession.

The People argue that defendant's admission to Farias that the gun lacked a clip and that he had ordered one implies that defendant had the gun for some time before offering it for sale.

Obviously, the rifle did not suddenly materialize in defendant's hands at the time of the sale, and he must have had possession of it sometime before the sale. However, that does not support a reasonable inference that defendant ever had possession without the intent to sell it to Farias. Such an inference is speculation. The Attorney General also argues that defendant's statement that he had ordered a clip for it implies possession independent of his intent to make an unlawful sale. This implication is also speculation. Moreover, ordering the part equally supports an inference that defendant acquired the gun for purposes of selling it and ordering the part was intended to facilitate the sale.

In sum, although the mens rea for unlawful possession and acquiring with intent may be different, the record does not support the trial court's finding that defendant acquired and possessed the rifle with independent objectives and intents. Accordingly, we conclude that section 654 bars separate punishment. Where multiple punishment has been improperly imposed, the proper procedure is for the reviewing court to modify the sentence to stay imposition of the lesser term. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.) Thus, we shall modify the judgment to stay the term imposed for unlawful possession.

V. DISPOSITION

The judgment is modified to stay the term and enhancements imposed for count 3—unlawful possession (§ 12021, subd. (a)). The Clerk of the Santa Cruz County Superior Court is directed to prepare an amended abstract of judgment and forward a

certified copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.